"POWERS COUPLED WITH AN INTEREST."

IT is a matter of practical importance to fix with precision the meaning of the phrase "a power coupled with an interest," because it is in constant use in the affairs of life, because it connotes a valuable legal right, and because it has been variously construed by the courts.

The incident of a power coupled with an interest which gives it special value is that it may be executed after the death of the person who gives it.[1] On account of this quality of such a power, there has been much litigation arising from the efforts of donees of powers to show that their powers are coupled with interests.

The leading case on this subject in the United States is the one just cited, in which the opinion was delivered by Chief Justice Marshall. It is the precedent to which litigants refer with confidence to sustain conflicting views, yet there seems to be no ambiguity in its meaning, or any omission in its exposition of the subject. While it declares the indestructibility of a power coupled with an interest by the death of the maker, it industriously expounds and limits its meaning.

The "power coupled with an interest" intended by Chief Justice Marshall when he used these words in the case cited, seems plainly to have been that power which accompanies estate or title in a thing real or personal, or that right in a chose in action which is metaphorically spoken of as title or estate. It is one of the group of powers constituting ownership. It is in fact title or estate or ownership, and is contrasted with a common law power of disposition over property given by a power of attorney.

The following is the language of the Court in that case: —

"We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. . . . The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest

[1] Hunt *v.* Rousmanier's Administrators, 8 Wheaton, 174.

are united in the same person. . . . But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. . . .

"We know that a power to A to sell for the benefit of B, engrafted on an estate conveyed to A, may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing."

In speaking of the instrument under consideration in Hunt *v.* Rousmanier, it was said, "This instrument contains no powers of conveyance or of assignment, but is a simple power to sell and convey."

It was also held that an interest in that which was to be produced by the exercise of the power, or the interest in the proceeds of a sale made under a power to sell did not constitute a power coupled with an interest.

The case of Hunt *v.* Rousmanier is an illustration of this distinction. In that case a power of sale of a vessel had been given to the donee of the power as security for a loan. It was held that such a power did not constitute a power coupled with an interest.

The phrase "an authority coupled with an interest" (in which the word "authority" is equivalent to "power") is to be found in Coke, by whom it was construed as it is in Hunt *v.* Rousmanier. A customary power in the lord of a manor to grant estates in fee simple is, according to him, "an authority coupled with an interest."[1] A power in a *tenant for years* to receive livery of seisin for a remainder-man is a power coupled with an interest.[2] The power in the patron and in the ordinary to confirm a lease made by a person (parson) is a power coupled with an interest, and so is the power of a disseisee to confirm a lease made by a disseisor.[3] In commenting upon section 169 of Littleton, Coke says that a devise that the executors may sell is a bare power, but a devise of lands to executors to be sold is a power coupled with an interest.[4] On the other hand, power to deliver seisin by the force of a deed of feoffment is not a power coupled with an interest.[5]

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[1] Coke upon Littleton, 52 b.

[2] Coke upon Littleton, 49 b.

[3] Coke's Commentary, § 520, Littleton.

[4] See also Coke upon Littleton, 181 b.

[5] Coke upon Littleton, 52 b.

A power of attorney to receive rents is not a power coupled with an interest.[1]

In the case of Hunt *v.* Rousmanier, it was decided not only that the power under consideration in that case was not coupled with an interest, but that powers not coupled with an interest do not survive the makers of them. It is to be borne in mind, however, that while this decision is in general terms, it is by virtue of the context to be limited to common law powers and does not refer either to powers under the Statute of Uses or to equitable powers.

In substance, therefore, the decision in Hunt *v.* Rousmanier is that where the title or estate in property or in a chose in action is transferred by way of security, the title or estate survives the death of the grantor or assignor, and the security continues good after such death; but that where a common law power over property or a chose in action is given by way of security, the power ceases on the death of the maker of the power. The first branch of the decision is of course a truism, and the stress of the opinion is on the latter point.

The ruling in Hunt *v.* Rousmanier has been followed in many of the American cases.

Where there is a power of sale contained in a mortgage, it has been held to be a power coupled with an interest.[2]

In Houghteling *v.* Marvin,[3] it was decided that where a mere power is given to a creditor to receive a debt as a security to him but there was no assignment, the power is revoked by the death of the principal.

In McGriff *v.* Porter,[4] it is said that a patent to enter upon the lands of the principal and to take and sell the stores given as a security is not a power coupled with an interest, and is revoked by the death of the principal.

Where A gave a power to prosecute a suit for lands and agreed to give B one half of the proceeds of the land, and gave him a mortgage to secure this agreement, it was held that the power was not coupled with an interest.[5]

Where one having a power of sale in a vessel with power of sub-

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[1] Willes's Reports, 105, note.

[2] Bergen *v.* Bennett, 1st Caine's Cases, 1804, per Kent, J.; see also Conners *v.* Holland, 113 Mass. 50.

[3] 7 Barbour, 412.

[4] 5 Fla. 373.

[5] Gilbert *v.* Holmes, 64 Ill. 549; see also Tharp *v.* Brennigan, 14 Iowa, 251; Chambers *v.* Seay, 73 Ala. 373; Walker *v.* Dennison, 86 Ill. 142.

stitution relinquishes all his interest in her, no legal title passes by such relinquishment, as the attorney has no interest in the vessel, but only a power to sell.[1]

In Taylor *v.* Benham,[2] the Supreme Court of the United States held that a devise that the whole of the property of a testator be sold (which power vested in the executors) was not a power coupled with an interest.

In Loring *v.* Marsh,[3] a power conferred upon the trustees, who were also invested with the legal estate, is said to be a power coupled with an interest.

A being indebted to B, executed a power of attorney authorizing B to receive moneys which should become due to A from C; it was held, inasmuch as the power of attorney not accompanying any assignment of the debt due from C to A, and not forming part of any security given for the debt due from A to B, the power of attorney was revoked by death.[4]

But neither in England nor in the United States are the decisions uniform as to the meaning of the words "power coupled with an interest." In the courts of both countries there are cases in which a common law power over property is said to be a power coupled with an interest *when it is given for the benefit of the donee of the power.*

In Smart *v.* Sanders,[5] it was said that "where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable."

In Clerk *v.* Laurie,[6] Williams, J., said: —

"What is meant by an authority coupled with an interest being irrevocable is this, that where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable."

The case of Godolphin *v.* Godolphin[7] was as follows: —

"A testator devised to his *sister* and her heirs forever, with a direction to settle the property on such of the descendants of the testator's mother

[1] Bingham *v.* Clark, 20 Pick. 43; see also Story, Agency, § 469; Mechem, Agency, § 205.

[2] 5 How. 233.

[3] 6 Wallace, 354.

[4] Lepard *v.* Vernon, 2 Vesey & Beames, 5.

[5] 5 C. B. 917.

[6] 2 H. & N. 199.

[7] 1 Vesey, 21.

as his *sister* should think fit, and the devisee having married, the question was raised whether the execution of the power by her, as she was under coverture at the time, was to be considered as valid. Lord Hardwicke said: 'It is objected that a *femme covert* cannot execute a power, and that there are no words in the will authorizing her to do so; but this is a power *without an interest*, and is improperly called a power, for, being a direction to a person who has the fee, it is rather a trust.'"

Hearle *v.* Greenbank[1] was this: —

"The legal estate was devised to trustees upon trust for an infant *femme covert* for her sole and separate use during her life, and upon trust to permit her by deed or writing executed in the presence of three or more witnesses, notwithstanding her coverture, to dispose of the estate as she should think fit, and the testator died leaving the *femme covert* his heir at law, and she, during the continuance of the coverture and infancy, exercised the power by will, Lord Hardwicke, upon the question whether the power had been duly executed, observed, 'This is a power *coupled with an interest*, which is always considered different from naked powers.'"

In Knapp *v.* Alvord,[2] a power to sell personal property given to secure the donee of the power was held to be a power coupled with an interest.

In Peter *v.* Beverly,[3] a power in a will not accompanied by a devise of the legal estate was said to be a power coupled with an interest.

The last English case on this point is that of *In re* Hannan's Express Gold Mining & Developing Co., Carmichael's Case, decided July 27, 1896,[4] which is as follows: —

"P promoted a company for the purpose of purchasing from him and working a mining company. C signed an underwriting letter addressed to P, by which he agreed, in consideration of a commission, to subscribe for 1000 shares in his company. C further agreed that the agreement and application should be irrevocable, and notwithstanding any repudiation by him should be sufficient to authorize P to apply for shares on behalf of C, and the company to allot them. P by letter accepted these terms.

"The authority given to P by the underwriting letter to apply for shares on behalf of P was an authority coupled with an interest and therefore not revocable. Lopez, L. J., said: 'The question that really arises is whether in this case it is an authority coupled with an interest. I think the answer is a very short and very complete one. What was the

[1] 1 Vesey, 298.
[2] 10 Paige, 205 (N. Y. 1843).
[3] 10 Peters, 235.
[4] [1896] 2 Ch. 643.

object? The object was to enable Mr. Phillips, the Vendor, to obtain his purchase money, and in the language of Williams, J., it therefore conferred a benefit on the donee of the authority.' "

While in the cases just cited a common law power over property given for the benefit of the donee of the power is said to be "a power coupled with an interest," this view in many of the cases is not necessary to the decisions, and they could have been decided as they were in accordance with the principle in Hunt *v.* Rousmanier, without holding that the powers under consideration were coupled with interests. The issue in many of the cases (as, for instance, in the one last cited) was as to the revocability of the powers *inter vivos;* they were powers given on valuable consideration as security to the donees, and such powers, though held in Hunt *v.* Rousmanier not to be coupled with an interest, were there declared to be irrevocable *inter vivos.*

In the case of Jeffries, Administrator, *v.* The Mutual Life Insurance Company,[1] recently decided by the Supreme Court of the United States, a meaning was attributed to the words "a power coupled with an interest" different from both of the two meanings above discussed.

In this case the facts were that Charles W. Jeffries, administrator, employed Laurie and Crews, attorneys at law, to prosecute a claim against The Mutual Life Insurance Company of New York on a policy of life insurance given to his testator. Jeffries gave the attorneys full power to compromise the suit as they should please, and agreed that they should have a portion of the proceeds of the suit as compensation. The attorneys agreed with him to prosecute the claim. Charles W. Jeffries died during the pendency of the suit, and Cuthbert S. Jeffries, who had been made administrator of the testator, was substituted as plaintiff in the suit in 1873. In 1879 Laurie made a compromise with the Insurance Company and entered satisfaction in the suit, which the plaintiff sought to set aside. The issue in the case was whether the power to compromise given by the first administrator continued in force after his death. The Court on this subject said: —

"The contract made by the first administrator having given to the attorneys *a power coupled with an interest,* the authority to compromise was not impaired by the death of the first administrator, and *his successor was bound by the contract.*"

[1] 110 U. S. 305.

It was conceded that the power to compromise given to the attorneys by Charles W. Jeffries came to an end with his death unless it was "coupled with an interest." The usual rule of law is that a power given to an agent may be revoked at the will of the principal or is revoked by his death, the agent who is dismissed in breach of his contract of employment having his remedy in a suit for damages. The case last cited turned, therefore, upon the meaning of the words "power coupled with an interest."

Now a power given to an attorney to compromise a suit is entirely different in kind from the power considered in Hunt *v.* Rousmanier. The latter was a power over property, the *jus disponendi*. The former did not concern property; it was not an estate, it was not a power to dispose of property; the exercise of it did not directly create a fund; it was not given as security. It was not coupled with an interest in the sense in which Hunt's power was claimed to be. It was coupled with an interest only in the sense that it was one step towards the attorney's obtaining the compensation agreed to be paid to him for his agency. Most powers in an agent are in such a sense coupled with an interest and would be on that ground irrevocable.

In the later case of Missouri *v.* Walker,[1] the facts were these: The State of Missouri entered into a contract with Walker to employ him as his agent for prosecuting certain claims of the State against the United States. By the contract it was agreed that the State would deliver to him the vouchers relating to the claims, and he was authorized to prosecute them in Washington. For his services he was to receive a contingent fee. The State afterwards repudiated its contract. Walker demanded certain vouchers which came within the scope of the contract, and they were refused to him. He then filed a petition for mandamus to compel the delivery of the vouchers. His petition was denied by the State court, and its judgment was affirmed on error by the Supreme Court of the United States.

In this case the Court cited with approval and followed the decision in Hunt *v.* Rousmanier, and decided that the agency of Walker was not coupled with an interest and was revocable. It said: —

"There is nothing, therefore, in the consideration for the employment to prevent this agency from being revoked like any other. The interest coupled with a power to make it irrevocable must be an interest in the

[1] 125 U. S. 339.

thing itself. . . . Here there was no actual assignment of the claims or any part of them. . . . There is nothing whatever in the transaction from beginning to end which shows an intention on the part of the legislature to part with any interest with or control over the claims, except to the extent of the commissions for the agent after they had been earned. . . . Clearly such an agency is not irrevocable in law because of its being coupled with an interest in the thing to be collected."

This case seems in effect to overrule Jeffries *v.* The Mutual Life Insurance Company, although it does not purport to do so.

The above summary of decisions justifies the remark made in the beginning of this article, that the law relating to "powers coupled with interests" is unsettled; it is not necessary to argue that this state of the law should not continue. What construction of such powers should prevail is a topic of jurisprudence. The suggestion may, however, be ventured that adherence to the principle of Hunt *v.* Rousmanier is the best policy. Nothing could be gained by declaring common law powers over property, even when given as security, irrevocable by death, because the result intended by giving to powers that effect can be always secured by a mortgage or charge. It would, however, be a substantial practical gain to put an end to the contention, not an unusual one, that a power of an agent to represent his principal cannot be revoked because the agent is to be remunerated for his services.

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